Welcome

Welcome to this week’s edition of BC Disease News. In the last week there has been further consolidation in the personal injury market and, the latest changes to the Civil Procedure Rules have been published. We also report on an ‘acoustic shock’ judgment.

This week we present two features. The first concerns the outcome in a recent BC Legal NIHL trial and the second concerns the date of knowledge in NIHL claims.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.
More CPR changes on the way

There are more changes due to the Civil Procedure Rules. The 66th update to the Rules, which is enacted by the Civil Procedure (Amendment No.7) Rules 2013, comes into force on 1 October 2013.¹

Thankfully, most of the amendments are administrative in nature. Nevertheless, there are some changes of note to disease practitioners. Perhaps most importantly in the substitution of the notorious Precedent H form for a new version. Mercifully, the changes are minor ones of form rather than substance.

Minor amendments have been made to PD18B, concerning group litigations orders, to ensure consistency.

Part 47 has been amended to clarify the amount of costs that may be recovered for matters that do not go beyond provisional assessment of costs, and whether the amount includes court fees and VAT. The change confirms court fees and VAT are not included.

Amendments have been made to PD52C on appeals to the Court of Appeal. The amendments relate to the filing of skeleton arguments, and lodging and filing of other documents related to appeals.

Finally, there has been an amendment to the new EL/PL protocol, although it is simply administrative.

A summary of all of the amendments can be found here.

More consolidation in the PI market

There is yet more consolidation in the personal injury market. Liverpool based SGI legal (an ABS) has acquired the personal injury caseload from Challinors, which went into administration last month.² In addition, Australian firm Slater and Gordon has confirmed that it will acquire personal injury firm Fentons Solicitors.³ It follows a raft of recent acquisitions by the firm which entered the UK market in 2012 when it acquired national PI practice Russell Jones and Walker.

Meanwhile well known claimant disease firm Roberts Jackson is looking to convert to an ABS and seeking external investment to ‘obtain caseloads from other firms as the legal market evolves and consolidates in response to the ‘Jackson reform’. The firm started in 2009 and in the last year head count rose from 43 to 170 with income growing from £7m in 2012/13 to a projected £23m by 2014/2015.

‘Acoustic shock’ claim fails

A claim for so called ‘acoustic shock’ was recently dismissed in the Cardiff County Court. In Goode v Abertawe Bro Morgannwg University Local Health Board the claimant worked in an NHS Direct call centre and wore a headset with an earpiece in her right ear taking calls from patients.⁴ She alleged that during a particular call there was a burst of ‘white noise’ from her headset which caused her to suffer ‘acoustic shock’, leading to hearing loss and tinnitus. She brought a claim in negligence and under Regulations 4 and 5 of the Provision and Use of Work Equipment Regulations 1998 alleging that the headset equipment was defective in that in it allowed noise above the industry limit of 118dB set by the DTI standard number 85/013.

The negligence claim was quickly dismissed on the issue of breach. HHJ Bidder QC concluded that the defendant had taken all reasonable steps to source suitable and safe equipment for its employees. Indeed, it had ensured acoustic limiters on the headsets limiting the noise to 112.3dB, less than the industry recognised standard of 118 dB. The claim under the regulations, for not providing suitable and efficient equipment that was properly maintained, also failed. The Judge was unimpressed with swathes of the claimant’s evidence. Her own evidence was inconsistent in a number of respects and not reliable. Further, no evidence had been obtained to prove the headset was defective or caused the white noise. On the balance of probabilities the claimant had simply not established that the white noise was even caused by the defendant’s equipment. It could have been from an external source. Further, the available evidence suggested the noise could never have exceeded 118 dB.
On the issue of causation, the Judge found that ‘acoustic shock’ is not experimentally established. Rather the evidence showed that the claimant had been subject to an ‘acoustic startle’. The loud sudden noise caused pain for no more than a week. Any hearing loss, hyperacusis (sensitivity to loud noises) or pain was attributable to the claimant’s other health conditions. No tinnitus was established on the balance of probabilities. For her transient pain the claimant would have been awarded £500 by way of damages for PSLA, had breach been established.

This claim was in some ways a missed opportunity. The Court did not really have to determine if it was amenable to accepting the concept of ‘acoustic shock’ because of the weak nature of the claim. Had it been stronger it would have been interesting to see if the Court would accept a condition that was not experimentally established.

HSE response to press about whole body vibration (WBV) in agriculture

The Control of Vibration at Work Regulations 2005 come into force for the agricultural and forestry industries in July 2014.

Recent media reports suggest that employees will not be able to use tractors for more than 30 minutes per day before a risk of whole body vibration (WBV) arises.

Yesterday the HSE responded to such reports by stating that their own research indicated that few on – farm activities using machines manufactured between 2001-2005, would give rise to employers exceeding the daily exposure limits for WBV.

The HSE did not ‘recognise the 30 minute limit on tractor use’. For older machines, simple steps can be taken to reduce vibrations levels – particularly ensuring regular maintenance of seats and suspensions. The HSE do not expect the regulations to lead farmers to replace serviceable equipment earlier than they would otherwise have expected to.

Feature: BC Legal’s first NIHL trial – Matthews v Lloyds Animal Feeds Limited

Last week saw us in our first NIHL trial. We are pleased to report the claim was successfully defended. John Williams of Crown Office Chambers appeared for the defendant.

The claimant worked as a Mill Operative at the defendant’s premises between 2003 and 2009. He worked in an office, predominantly working 8 hour shifts, undertaking typical office duties. He occasionally visited the production area. He claimed the level of noise in the office was so loud he couldn’t communicate without shouting and that his complaints went unheeded, causing NIHL and tinnitus. The claimant’s audiogram showed bilateral notching at 4 kHz.

Mr Recorder Male, sitting at Southend County Court, dismissed the claim. Breach of duty was not established. The Recorder rejected the claimant’s contention that it was necessary to shout in the office; any noise from the production area was reduced by the distance between it and the office, and by the construction of the office itself: a multiple layer plywood and concrete block insulated building.

The claimant’s evidence that he had reported issues with noise was not accepted; indeed, there was no record of him having ever made a complaint about the noise level despite being elected as a shop steward. He also had failed to visit his GP, as might have been expected.

There had been regular audits of the defendant’s premises and each of these had determined that the audible sound was sufficiently low such that there was no necessity to take noise level readings. This course of action was vindicated since the readings taken by the defendant’s engineering expert showed a level of 71.2 Leq dB(A), far below the 80dB(A) lower control limit in the Control of Noise at Work Regulations 2005. There were no unsatisfactory noise levels in the office.

In any event, the defendant was aware of its obligations, having provided hearing protection to the claimant for when he visited noisier parts of the premises. There simply had not been exposure to excessive noise in this case. There was no breach of duty.

With the claim having failed on breach, causation was no longer an issue. The claimant had relied on the medical evidence of Mr Singh and his audiogram showing deep bilateral notching present at 4kHz. However Mr Singh had properly recognised that a diagnosis of NIHL could not be made on audiometric pattern alone – there must also be proof of exposure to excessive noise (requirement R2 under the Cole Guidelines).

Had the claim been successful the Recorder indicated that he would have awarded £9,000 by way of damages for PSLA. With respect to hearing aids, there was a paucity of evidence on when they would become necessary. The Recorder would have awarded £500.
Feature: the employer’s date of knowledge in NIHL claims

Introduction

Exposure to excessive noise has been recognised as a danger for over 100 years. Indeed, the resulting hearing loss was often described by association with the occupations in which it arose, such as Blacksmiths’ deafness. Nevertheless, it was not until the latter part of the 20th century that thought was directed at minimising the problem in the industrial context. In June and July 1963 respectively, the Ministry of Labour’s Noise and the Worker leaflet and the Wilson Committee’s report were published, officially identifying the risk of excessive industrial noise.

In negligence, an employer is not liable for injury which arises from dangers that are not reasonably foreseeable. The earliest NIHL claims appeared in the 1960s but were unsuccessful as a result of exposure occurring many years before the risks were foreseeable. Therefore the question arises: when an employer be held to have known about the risk of excessive noise? Moreover, there is the question of ‘guilty knowledge’; just because there is knowledge (actual or constructive) it does not mean that it is automatically guilty knowledge. An implementation period is normally granted before an employer will be in breach of their obligations. We will address these two issues.

Initial approach

The first judicial indication of the date at which an employer would be held to know about the danger of excessive noise was provided in Thompson v Smiths Shiprepairers (North Shields) Ltd. In that case, concerning claims made by shipbuilders, the court held that the employer had actual knowledge by 1963, by reason of the abovementioned publications. This judgment led to a widespread approach of treating the date of knowledge as 1963.

Flexibility?

Previous authority had suggested that in a developing field of knowledge the date of knowledge is not fixed. Instead it is metamorphic, reflecting developing knowledge and the availability of that knowledge to each employer. Swanwick J held, in Stokes v Guest, Keen and Nettlefold, that ‘the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it.’ This clearly indicates a flexible approach to an employer’s date of knowledge, based on the type of industry, the particular employer and the level of exposure. Indeed, a small employer with little access to developing knowledge would be expected to take action later than a larger employer in a highly susceptible industry with access to the latest research.

So how has this flexibility been applied? In Down v Dudley, Coles, Long Ltd, it was held that 1966 was too early for a date of knowledge. The ordinary reasonable employer, safety officer or foreman in 1966 would not be aware of the dangers of cartridge-assisted nail-fixing tools. In Kellet v British Rail Engineering Ltd however, Prippewell J held the defendant’s actual date of knowledge to be 1955. The defendant had actively considered the problem of exposure to noise and had been advised by a medical officer to issue employees with hearing protection. Conversely, in Craven v Tonks Transport, it was held that constructive knowledge was present from 1972, following the publication of the Department of Employment’s Code of Practice on Noise. The defendant was a lorry company and it was only with the publication of this general national guidance that it would have been alerted to the risks.

This flexibility was more recently affirmed by the decision of the Supreme Court in Baker v Quantum Clothing Group. The Court held that not all employers should be fixed with the same date of knowledge in 1963. Moreover, knowledge in that year should be fixed from the middle of that year onwards thereby reflecting the publication of the two documents in the earlier part of the year. Smaller and medium sized employers, particularly in industries not associated with excessive noise, should have a later date of knowledge. This may be as late as the 1972, following publication of the Department of Education’s Code of Practice.

Although there is flexibility, it seems that the date of knowledge is unlikely to ever be after 1972: the Department of Employment’s code should have been in the minds of all employers. By then, the dangers of exposure to noise exceeding 90 dB(A) Lepd (noise over an eight hour day) were clear.

Implementation period

Once an employer knows or ought to know about the risk, it is unrealistic for them to immediately take measures to reduce the risk.
Mustill J recognised as much in Thompson: ‘...one must answer this question. From what date would a reasonable employer, with proper but not extraordinary solicitude for the welfare of his workers, have identified the problem of excessive noise in his yard, recognised that it was capable of solution, found a possible solution, weighed up the potential advantages and disadvantages of that solution, decided to adopt it, acquired a supply of protectors, set in train the programme of education necessary to persuade the men and their representatives that the system was useful and not potentially deleterious, experimented with the system, and finally put it into full effect’.

So what periods have the courts given? In Bowman v Harland and Wolff the court suggested the likely implementation period given would be two years. In Armstrong v British Coal Corporation the court said the implementation period would be at least two years. Further, it suggested that the implementation period is not set in stone.

Finally, in Smith v Wright and Beyer Ltd, Brookes v South Yorkshire Passenger Transport Executive, and Maxfield v ATS North Eastern Ltd, the courts held the implementation period was two years.

In Baker, the Supreme Court rejected the Court of Appeal’s view that the implementation period was 6-9 months. Instead, it agreed with Judge Inglis’ view at first instance that the period was two years. So, with an implementation period of two years, the date of breach in relation to the 1963 documents is in the region of 1965, and in relation to the 1972 Code of Practice the date of breach is 1974.

**Conclusion - implications for disease litigation**

Baker confirmed the long established rule that the date of knowledge is not fixed, it can change depending on the circumstances. Moreover, the implementation period for measures is two years. It shows that investigations should always focus on when a particular industry could be reasonably expected to have been aware of the risks and, where appropriate, arguments made to the effect that the date of knowledge was later than suggested by the claimant.

In NIHL claims a 1963 date of knowledge should not automatically be assumed. Arguably this (or an earlier date) only applies to heavy industry where there was significant exposure to noise.

The publication of documents in 1963 which gave rise to this assumed date of knowledge was not widespread. Arguably for many industries and occupations a later 1974 guilty date of knowledge may be relevant.

Whilst we are not advocating change to the IDCWP Guidelines, which apply an uniform date of knowledge of 01.01.1963 for clarity and consistency of claims handling, such foreseeability arguments may be usefully employed by defendants where all their exposure occurs pre 1974.

**References**


4 (Cardiff County Court, 5 August 2013)


6 [1968] 1 WLR 1776.

7 (1969) unreported.


10 [2011] 1 WLR 1003.

11 Thompson at 423.


13 [1997] 8 Med LR.

14 [2001] EWCA Civ 1069.

15 [2005] EWCA Civ 452.

16 (2008) Leeds CC, unreported
BC Disease News is taking a break for 2 weeks but is back W/C 9th September

Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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